Before the

Federal Communications Commission

Washington, DC 20554

In the Matter of	)	
	)	
Wireless Consumers Alliance, Inc.	)	WT Docket No. 99-263
	)	
Petition For a Declaratory Ruling Concerning Preemption of State Court Awards of Monetary Relief Against Commercial Mobile Radio Service Providers	)	

To: The Commission

COMMENTS OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

Michael F. Altschul
Vice President, General Counsel
Randall S. Coleman, Vice President for
Regulatory Policy and Law
Vice President, General Counsel
1250 Connecticut Avenue, N.W., Suite 800
Washington, D.C. 20036
(202) 785-0081

Its Attorneys

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SUMMARY

The FCC has before it a Petition for Declaratory Ruling filed by the Wireless Consumers Alliance, Inc. (WCA). The WCA previously filed suit in California State Court seeking monetary relief for cellular subscribers due to alleged coverage gaps. Its claims for monetary relief were dismissed when the state trial court found that the monetary relief sought by the plaintiffs constituted rate regulation, which is specifically preempted by Section 332 of the Communications Act. Having lost in state court, the WCA now asks the FCC to decide whether that statute preempts all state consumer protection laws. The answer to that question is obviously "no," but WCA has framed the wrong issue. The question presented by the state court lawsuit, which remains pending on appeal, is whether a state court may award monetary relief based on an evaluation of the justness and reasonableness of the CMRS carriers' rates. Such a suit necessarily involves determining what the rates should have been and refunding the alleged overcharges. The California court found this "would require the state court to regulate or adjust rates which is prohibited by Section 332."

The essence of the lawsuit here is that the rates charged by a CMRS provider were excessive in light of the service provided. The Communications Act expressly preempts state regulation of the "rates charged by" CMRS providers. Section 332(c)(3) provides that "no State . . . shall have any authority to regulate the rates charged by any commercial mobile service." The case law makes clear that judicial action in the form of damage awards concerning the provision of a telecommunications service constitutes regulation of rates. The statute does not exempt rate regulation based on state consumer protection laws. WCA would have the court evaluate the "justness and reasonableness" of the rates charged by a CMRS provider and refund the difference if an overcharge finding is made. The state court correctly found that this constituted rate regulation, which is explicitly fenced off from state interference by Section 332.

WCA unsuccessfully tries to distinguish cases preempting state court awards of monetary damages on the ground that those cases are premised on the filed rate doctrine, which is inapplicable to CMRS. The courts — including the Supreme Court in *AT&T v. Central Office Telephone* decision — have held that damage awards effectively change rates and are barred because they violate the federal statutory rate-setting scheme. Both the filed rate doctrine and Section 332 are such Congressional schemes, and both are equally violated by state court rate determinations. The fact that the FCC has forborne from employing the mechanism of tariffs to regulate CMRS rates is irrelevant — forbearance itself is part of the federal statutory scheme set forth in Section 332.

Finally, WCA's Savings Clause argument is without merit. The Supreme Court held in *Central Office Telephone* that the Savings Clause "preserves only those rights that are not inconsistent with the statutory . . . requirements." Thus, only state law claims that are independent of those provided for in the Communications Act are preserved, not claims for monetary relief damages that conflict directly with Section 332.

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COMMENTS OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The Cellular Telecommunications Industry Association[1] ("CTIA") hereby submits its Comments on the Petition filed by the Wireless Consumers Alliance, Inc. ("WCA") seeking a declaratory ruling concerning whether either the Communications Act or the Commission's jurisdiction thereunder preempts state courts from awarding monetary relief against commercial mobile radio service ("CMRS") providers under certain circumstances (the "Petition").[2] The answer is clear; Section 332(c) of the Communications Act, coupled with the Commission's orders, withdraws authority from the state courts to award monetary damages based on an evaluation of the reasonableness of the rates charged by CMRS carriers. No matter how artfully

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[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including 48 of the 50 largest cellular and broadband personal communications service ("PCS") providers.

[2] Public Notice, *Commission Seeks Comment on Petition of the Wireless Consumers Alliance, Inc. For a Declaratory Ruling on Communications Act Provisions and FCC Jurisdiction Regarding Preemption of State Courts from Awarding Monetary Damages Against Commercial Mobile Radio Service Providers for Violation of Consumer Protection or Other State Laws*, WT Docket No. 99-263, DA 99-1458 (July 28, 1999).

a plaintiff may attempt to plead an action as falling under otherwise valid state laws, a state court action seeking monetary compensation due to the carrier's allegedly overstated service area is nothing more than an attempt to have the state determine the "justness and reasonableness" of the CMRS carrier's rates.

Congress has specifically deprived state and local governments of the authority to second guess the rates charged by CMRS carriers. A court could not award damages based on the quality or extent of a carrier's coverage without adjudicating the reasonableness of the carrier's rates, and any award of damages would constitute retroactive modification of those rates or a refund for overcharging. Such an evaluation would force the state court to interfere with the federal rate scheme fenced off by Congress in Section 332 of the Communication's Act.

WCA claims that it only seeks to have the court regulate the "other terms and conditions of commercial mobile services," which the states remain free to regulate.[3] Nothing could be farther from the truth. To the extent its lawsuit seeks monetary compensation, in the form of rebates, discounts, or other payments to customers who allegedly paid too much, WCA is seeking an evaluation of the rate charged and a reduction of the rate paid for the service —a matter specifically preempted by Section 332. Thus, there is no need here for an interpretation of the scope of "other terms and conditions" given the direct interference with the rate-setting process urged by WCA.

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[3] *See* 47 U.S.C. § 332(c)(3)(A).

BACKGROUND

The WCA and others are pursuing a class action lawsuit in California state court against Los Angeles Cellular Telephone Company ("LA Cellular"), a CMRS provider serving Los Angeles, Riverside and San Bernardino counties.[4] This lawsuit grew out of an individual tort action concerning an alleged "dead spot" within LA Cellular's composite contours on file at the FCC defining the carrier's reliable service area. While the individual action has been settled, the WCA continues to litigate its related class action suit, in which it seeks monetary damages on behalf of a proposed class consisting of LA Cellular customers. Under a variety of legal theories premised on state law, WCA claims that LA Cellular is liable for monetary damages for failure to provide service throughout its entire service area.

The initial complaint filed in the State Court litigation alleged that LA Cellular's disclosure of a map showing its composite reliable service area contours based on the FCC's regulations (the "FCC map") in its marketing materials was misleading and the rates charged were inappropriate for the service received. In its motion to dismiss the complaint, LA Cellular demonstrated how the FCC regulated the cellular radio service area and showed that its regulations permit dead spots to exist within a "reliable service area," which are deemed served. The Court dismissed the initial complaint, and plaintiffs filed a Second Amended Complaint. There, WCA alleges that LA Cellular advertised and sold its cellular service as qualitatively better and geographically broader than it is.[5] It alleges that customers "received substantially less

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[4] *Spielholz v. Los Angeles Cellular Telephone Co.*, Case No. BC 186787.

[5] *See* Second Amended Complaint ("SAC") at ¶¶ 2, 3, 4, 20, 24, 25 and 33 attached as Exhibit A to Declaration of Christine Naylor, Exhibit 1 to Petition.

service than that for which they contracted" and seeks an injunction as well as "all sums wrongfully obtained" by LA Cellular through an award of damages, restitution, and/or disgorgement of profits.[6]

LA Cellular moved the Court to strike only plaintiff's claim for monetary damages, on the grounds that the Communications Act preempts state courts from awarding damages in this case. As LA Cellular stated, "[a]ny such relief would be the legal and logical equivalent of rate regulation" and is expressly preempted by § 332(c)(3)(A) of the Communications Act.[7]

On February 16, 1999, the trial court entered an order finding that WCA's "allegations as to monetary damages violate the preemptive mandate of Section 332 of the Federal Communications Act" because the "recovery allegations would require the state court to regulate or adjust rates which is prohibited by Section 332."[8] The WCA filed a petition with the California Court of Appeal seeking review of this determination pursuant to a writ of mandate. On June 15, 1999, the California Court of Appeal stayed the proceedings to permit the WCA to seek the Commission's views on "whether the Federal Communications Act preempts state courts from awarding monetary relief as a remedy for fraud and false advertising claims," and stated that it would "defer ruling on the instant petition pending action by the FCC."[9] In response to this order, on July 16, 1999, the WCA filed the instant Petition.

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6 *See id.*, SAC at ¶¶ 33, 35.

7 *Id.*, Memorandum of Points and Authorities of Defendants L.A. Cellular and AT&T Wireless Services in Support of Motion to Strike Improper Claims for Relief in Second Amended Complaint, at 1.

8 *See* Exhibit 4 to Petition.

9 *See* Exhibit 7 to Petition.

THE ISSUE PRESENTED BY WCA IS OVERLY BROAD

WCA states that the Commission can ignore the facts of the case (and apparently the limited scope of the court's ruling) and merely "declare th[at] CMRS providers are not endowed with special status in the market place which shields them from state laws which regulate normal commercial practice by reason of the provisions of the Communications Act or the exercise of the Commission's jurisdiction."[10] That is far broader than the narrow issue before the California courts, and a broader claim than the California Court of Appeals gave the WCA leave to bring to the Commission — "whether the Federal Communications Act preempts state courts from awarding monetary relief as a remedy for fraud and false advertising claims."[11] The Court of Appeal order does not seek guidance on the broader questions of whether Section 332(c)(3)(A) immunizes CMRS providers from state law misrepresentation and fraud actions in general. Accordingly, there is no need for the Commission to decide whether, or to what degree, California's consumer protection laws have been preempted on a wholesale basis by the Communications Act insofar as CMRS providers are concerned.

Before the trial court, LA Cellular successfully argued that the basis of Plaintiffs' claims is that "they received substantially less service than that for which they contracted."[12] The court agreed, holding that because the monetary recovery sought "would require the state court to regulate or adjust rates which is prohibited by Section 332," the allegations "violate the pre-

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10 Petition, Summary at ii.

11 *See* Exhibit 7 to Petition.

12 *See* SAC at ¶ 33, Exhibit 1.

emptive mandate of Section 332."[13] The validity of the trial Court's holding is all that is before the California Court of Appeal, and the Commission need go no farther than to address this issue.

The measure of damages necessarily would have involved a determination of whether the service and coverage the class members actually received was worth the rate they paid — in essence, a determination of what rate the class members should have been charged in light of the service provided. The monetary relief sought includes disgorgement of some portion of the rate charged based on this retroactive determination of what the rate should have been. In other words, to award damages, the Court would have been required to determine the appropriate rate the carrier should have set for the service — a matter specifically preempted by the Communications Act. Moreover, an integral part of the determination of the appropriate rate would involve the Judge determining what service area LA Cellular serves reliably enough to charge for, even though a cellular carrier's reliable service area is pervasively regulated by the FCC.

Thus, the issue properly presented to the Commission for decision is whether the Plaintiffs' claim for monetary damages so involves an organ of California state government in determining the reasonableness of rates set by a CMRS provider that it is preempted by Section 332(c)(3)(A) of the Communications Act.

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[13] The Judge rejected Plaintiff's motion to clarify stating that the ruling spoke for itself. Petition, Exhibit 4.

DISCUSSION

I. STATE COURTS HAVE NO AUTHORITY TO AWARD MONETARY RELIEF BASED ON AN EVALUATION OF THE RATES CHARGED BY CMRS CARRIERS

A. The Communications Act Expressly Preempts State Regulation of the Rates Charged by Cellular Telephone Carriers

Federal preemption can occur in three circumstances: (1) Congress "can define explicitly the extent to which its enactments preempt state law;" (2) "in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively;" and (3) "state law is pre-empted to the extent that it actually conflicts with federal law."[14] Preemption is "fundamentally . . . a question of congressional intent."[15] Congress has unequivocally expressed its intent to preempt all state regulation of cellular service rates. This case involves explicit congressionally mandated preemption.

In 1993, Congress enacted the Budget Act, which included amendments to Section 332(c) of the Communications Act that established an exclusive federal regulatory scheme for radio-based commercial mobile services, which the FCC terms Commercial Mobile Radio Services ("CMRS").[16] In light of the competition wireless common carriers were facing from each other and from nominally private carriers who were not subject to state rate or entry regulation,

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[14] *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990).

[15] *Id.*; *see also Cippillone v. Liggett*, 505 U.S. 504, 517 (1992) ("When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' 'there is no need to infer congressional intent to preempt state laws from the substantive provisions' of the legislation.") (internal citations omitted).

[16] Omnibus Budget and Reconciliation Act of 1993 ("Budget Act"), § 6002, 107 Stat. 312

Congress decided to equalize this disparate regulation by creating the new category of CMRS and preempting state authority to regulate rates and entry concerning *all* CMRS carriers. CMRS was defined very broadly to cover cellular, PCS, interconnected SMR, and functionally indistinguishable carriers. Section 332(c)(3) provides that "*no State . . . shall have any authority to regulate...the rates charged by any commercial mobile service.*"[17] The legislative history makes clear that Congress sought "[t]o foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure," and that it achieved this broad federal purpose by "preempt[ing] state rate and entry regulation of all commercial mobile services."[18] Based on this clear direction from Congress, the Commission has found that Section 332(c)(3)(A) expresses an unambiguous congressional intent to foreclose state regulation in the first instance.[19]

Congress provided only one exception to this rule: a state may attempt to persuade the Commission to grant it rate regulation authority over CMRS by filing a petition showing that CMRS has become a "substantial substitute" for land line service.[20] States carry a high burden of

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(1993); 47 U.S.C. § 332(c).

17 47 U.S.C. § 332(c)(1)(A) (emphasis added).

18 H.R. Rep. No. 111-103, 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587. Moreover, the Telecommunications Act of 1996 provided that it did not intend to change the state preemption contained in Section 332(c)(3)(A). *See* 47 U.S.C. § 253(e) (as added by the 1996 Act).

19 *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket 93-252, *Second Report and Order*, 9 F.C.C.R. 1411, 1504 (1994) (*CMRS Second Report and Order*).

20 *Id.*

proof to successfully prosecute these petitions, and to date no State has made the required showing.[21]

The same 1993 legislation that preempted state CMRS rate regulation also granted the Commission authority to forbear from applying a number of provisions of Title II of the Communications Act to CMRS providers.[22] Among the provisions as to which the Commission exercised this forbearance authority are Sections 203, 204 and 205 — which prescribe the tariff process.[23]

WCA attempts to argue that the FCC's decision not to accept CMRS tariffs left a jurisdictional vacuum in which the states were free to reenter and reregulate through adjudication of consumer class action litigation.[24] This is simply not true. The states have been completely barred by Congress from regulating the rates charged by CMRS providers — not only tariff regulation, but regulation, period. The fact that the FCC has exercised the forbearance authority granted by Congress, and freed CMRS providers from tariff regulation does *not* create some regulatory void that the states are free to fill. Rather, it represents the FCC's lawful determination that CMRS rates should not be subject to active regulation at either the state or federal level.

The FCC's tariff forbearance did not represent a relinquishment of the Commission's jurisdiction over wireless rates. It represented the replacement of one enforcement mechanism

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21 *See Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates*, 10 F.C.C.R. 7486, 7493 (1995).

22 *See* 47 U.S.C. § 332(c)(1)(A).

23 *CMRS Second Report and Order*, 9 F.C.C.R. at 1478-80.

with another — namely, instead of regulation of rates through tariffs, the Commission chose to ensure that CMRS rates are just and reasonable through the federal complaint process governed by Section 208. Indeed, in explaining its decision to forbear from tariffing, the Commission made clear that it would continue to employ the remedial scheme provided for under the Communications Act to address consumer complaints regarding discriminatory rates:

> Compliance with Sections 201, 202 and 208 is sufficient to protect consumers. In the event that the carrier violated Sections 201 or 202, the Section 208 complaint process would permit challenges to a carrier's rates. . . .[25]

The Commission's forbearance decision was designed to enhance competition by freeing CMRS carriers from cumbersome and onerous regulation. That decision was not an abdication of the Commission's authority over CMRS rates. In fact, Sections 201, 202 and 208 of the Communications Act still govern the justness and reasonableness of rates and provide an FCC complaint process to address problems associated therewith. When the FCC recently reformed its complaint procedures, it made clear that even though Section 208(b) generally applies only to formal complaints about the lawfulness of a charge, classification, regulation, or practice contained in a filed tariff, it also covers "those matters that would have been included in tariffs but for the Commission's forbearance from tariff regulation."[26] The FCC also amended its complaint rules to assure "prompt resolution of *all* complaints of unreasonably discriminatory or

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[24] *See* Petition at 16-18.

[25] CMRS Second Report and Order, 9 F.C.C.R. at 1479.

[26] *Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed,* CC Docket No. 96-238, 12 F.C.C.R. 22,497, 22,514 (1997)(*Report and Order).*

otherwise unlawful conduct by telecommunications carriers."[27] The Commission undertook to resolve all formal complaints involving "investigations into the lawfulness of a charge, classification, regulation or practice" — including those involving detariffed services — within five months.[28]

The fact that the Commission has decided not to utilize tariffs as the rate-setting mechanism for CMRS providers does not leave the states free to entertain state law challenges to the rates set by CMRS carriers. Such challenges would interfere with the FCC's lawful decision not to engage in the regulation of CMRS rates, except through the complaint process established in the statute. The Third Circuit reached a similar conclusion when presented with the issue of whether federal rail tariff deregulation left state courts free to entertain challenges to the detariffed rail rates under state common law. In *G&T Terminal Packaging Co. v. Consolidated Rail Corp,* the court decided that states were preempted from adjudicating common law rate challenges, reasoning that:

> Recognition of a common law remedy with respect to rates would have the effect of substituting a court's regulation for the Commission's decision in favor of deregulation. In the [rail deregulation statutes], Congress has decided in favor of permitting railroads to fix their own rates, subject only to the regulation imposed by the competitive market, except in cases where in the judgment of the Commission, competitive forces do not operate effectively.[29]

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27 *Id.* at 22500 (emphasis added).

28 *Id.* at 22513.

29 *G&T Terminal Packaging Co, Inc.. v. Consolidated Rail Corp.*, 830 F.2d 1230, 1235 (3d Cir. 1987), *cert. denied* 485 U.S. 988 (1988).

B. A Class Action Award of Monetary Relief Would Require the Court, a State Body, to Evaluate and Revise — *i.e.*, Regulate — the Rates Charged by a CMRS Provider to Its Entire Subscriber Base

It is undisputed that state judicial action in the form of damage awards constitutes a form of state regulation.[30] It is equally clear that the WCA class action claim for monetary relief in its California litigation will require the state to evaluate the rates set by the defendant CMRS provider. Plaintiffs are seeking a judicially-determined rebate or refund to LA Cellular's entire customer base[31] of some or all of the charges they paid LA Cellular for service, through their request for compensatory damages, restitution and/or disgorgement of profits. Simply put, Plaintiffs are asking the Court to find that they have "received substantially less service than that for which they contracted" and they therefore paid the wrong rate and are due a refund.[32] At the hearing on LA Cellular' motion to strike, Plaintiffs said as much:

> THE COURT: Aren't [damages] going to be based on the fact that the subscribers did not get what they thought they were getting and the service was not worth as much as it was advertised to be worth?

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30 *See Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325-26 (1981) (holding that the Interstate Commerce Act precludes a shipper from pressing a state-court action for damages against a regulated rail carrier when the ICC has ruled on the merits of the matters raised in state court); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578-79 (1981) (holding that a state court damage action over contract that had been approved by the Federal Power Commission constituted impermissible attempt to obtain retroactive rate change); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959) ("Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief.").

31 The class has not yet been certified.

32 *See* Petition, Exhibit 1, SAC at ¶ 33.

> [COUNSEL FOR PLAINTIFFS]: In some way, yes, Your Honor, but the emphasis I think will be on what the — you are right. I think that the class members' damages will be measured by what they lost, and in order to determine that, you have to look at what they paid. I think that much is true. But I don't think that that would enmesh the Court in rate making, and I think that's what every other court in this particular context against the cellular telephone companies has concluded.
>
> THE COURT: Well, it seems like another way of saying that they were overcharged and didn't get services they thought they were getting, and in a way, that's then changing the rates or regulating the rates, is it not?[33]

To determine whether and how much WCA's class should recover, the court will necessarily have to evaluate the rates charged to determine whether LA Cellular's charges were reasonable given the service provided. The nature and quality of service and the rates charged are inextricably tied to each other, as the Supreme Court recently reiterated in *AT&T v. Central Office Telephone*:

> Rates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate service and vice versa.[34]

Thus, in the context of WCA's claim for monetary relief, any determination by the court that the service was inadequate necessarily constitutes a finding that the rates charged by the CMRS provider were unreasonable. The next step, if the rates are deemed unreasonable, is for the Court to determine the rate that LA Cellular "should" have charged. Then it would order compensation based on the difference between what was charged and what the carrier "should"

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[33] Petition, Exhibit 6, Preliminary Opposition to Petition for Writ of Mandate or Other Extraordinary Relief at 6-7.

have charged — which has the effect of retroactively revising downward the rates charged by the carrier. These rate revisions could potentially affect each and every LA Cellular subscriber depending on the outcome of the class certification process.[35] In short, the court would have to perform an evaluation of rates for each of the millions of LA Cellular subscribers to determine liability, much less provide the remedy that the plaintiffs seek. This point was obvious to the California district court, when it found that this "would require the state court to regulate or adjust rates which is prohibited by Section 332."[36]

The judgments that the WCA would have the court engage in constitute a direct interference with the process by which the CMRS carrier sets its rates — an area expressly fenced off from state and local authorities by Section 332, as the district court in this case recognized when it refused to engage in the prohibited regulation of CMRS rates. Such an action goes to the very heart of the rate setting process. Indeed, the United States Supreme Court has

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[34] *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 223 (1998).

[35] Indeed, the evaluation of affected subscribers in the class certification process will revolve around, among other things, the reliable service area of the carrier at the time the proposed class member was a customer. Even this issue falls within the Commission's Title III jurisdiction over radio communication. *See* 47 U.S.C. § 301 *et seq.* Under Commission regulations, each cellular service provider operates in its own Cellular Geographic Service Area ("CGSA"). The CGSA is now defined to be coterminous with the area in which there is "reliable cellular service" as defined by Commission regulation. *See Amendment of Part 22 of the Commission's Rules*, 7 F.C.C.R. 2449, 2452-54 (1992) ("*Part 22 Rewrite Order*"); *see also Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1313-14 (D.C. Cir. 1995). The rules define how this is calculated. *See* 47 C.F.R. § 22.911; *Part 22 Rewrite Order*, 7 F.C.C.R. at 2454. Importantly, the rule expressly authorizes a carrier's reliable service area to include "dead spots" and deems these areas "served." 47 C.F.R. § 22.99.

[36] *See* Exhibit 4 to Petition.

long recognized that determining the reasonableness of common carrier rates and providing refunds or reparations to consumers charged unreasonable rates are the essence of rate making.[37]

Civil litigation in which damages are sought is an indirect attempt to change the rates charged for service. Where the rates are set by tariffs filed with regulators,[38] the "filed rate doctrine" establishes that the filed tariff rate is the "only lawful charge."[39] Thus, a civil suit seeking damages against a carrier can have the effect, if successful, of changing the net rate paid

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[37] *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway,* 284 U.S. 370, 384-85 (1932) ("The [Interstate Commerce Act] altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate. If the finding on this question was against the carrier, reparation was to be awarded the shipper, and only the enforcement of the award was relegated to the courts.") (internal citations omitted). Section 204 of the Communications Act provides the Commission express authority to grant refunds after a hearing to determine the reasonableness of the rates, 47 U.S.C. § 204. The U.S. Court of Appeals for the D.C. Circuit has also held that the Commission has refund authority under Section 4(i) where a carrier has exceeded FCC set rate of return. *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1106-09 (D.C. Cir. 1987).

[38] WCA incorrectly characterizes tariff regulation as involving "rates established by regulatory commissions." Petition at 13. At this point, the overwhelming majority of states follows a "price cap" model, in which the commissions decidedly do not "establish" rates. Even in the absence of price caps, however, tariff regulation does not involve rates established by the regulatory commission. In fact, tariffs are carrier-initiated and do not necessarily involve rates that have been established or even reviewed substantively by regulators. When tariffs are filed, the Commission staff examines the filing to determine whether, as a threshold matter, rejection or suspension of the tariff is warranted. This review, however, is limited only to situations where the tariff is "so patently a nullity as a matter of substantive law, that administrative efficiency and justice are furthered by obviating any docket at the threshold." *Municipal Light Boards v. FPC*, 450 F.2d 1341, 1346 (D.C. Cir. 1971). In situations in which the tariff is not patently unlawful, the Commission may suspend the tariff for up to 5 months and begin an investigation, *see* 47 U.S.C. § 204, but it need not do so, and its decision to allow a tariff to go into effect rather than suspend and investigate is unreviewable. *See Direct Marketing Association v. FCC,* 772 F.2d 966, 969 (D.C. Cir. 1985); *ARINC v. FCC,* 642 F.2d 1221, 1235 (D.C. Cir. 1980); *see also Southern Railway v. Seaboard Allied Milling Corp.,* 442 U.S. 444, 455, (1979). Normally, the Commission does not reject a tariff and they go into effect automatically without any just and reasonable finding. *See Arizona Grocery,* 284 U.S. at 384-85.

[39] *Louisville & Nashville Railway v. Maxwell,* 237 U.S. 94, 97 (1915).

for service, thus giving the successful suitor an unlawful preference, or lower rate.[40] In *Central Office Telephone*, the Supreme Court made clear that damage suits are preempted by the filed rate doctrine even where the suit nominally asks for damages for violation of the terms of a contract — terms not contained in the tariff — or for tortious interference, where such claims relate to the service provided under the tariff rate. The Court held that a customer "can no more obtain unlawful preferences under the cloak of a tort claim than it can by contract."[41]

The same effect is true under Section 332. If the effect of the litigation is to grant subscribers — and here the class consists of the entire subscriber base — a cash damages award, it matters little whether the legal theory for the damage award is in tort, contract, fraud, or misrepresentation, because a reduction in CMRS charges — whether before or after the fact — constitutes regulation of the rates charged by the CMRS provider and is beyond the jurisdiction of any state authority to order.

While the filed rate doctrine is not directly applicable here, the reasoning and analysis in cases involving that doctrine are instructive. In particular, one theory underlying the filed rate doctrine is directly applicable to Section 332 cases. That is the notion that rates, together with the other interrelated terms of a carrier-subscriber relationship, are nonjusticiable. The Second Circuit has summed up this part of the filed rate doctrine as follows:

> (1) legislatively appointed regulatory bodies have institutional competence to address rate-making issues; (2) courts lack the competence to set . . . rates; and (3) the interference of courts in the

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40 *Central Office Telephone,* 524 U.S. at 224-25.

41 *Central Office Telephone,* 524 U.S. at 227.

> rate-making process would subvert the authority of rate-setting bodies and undermine the regulatory regime.[42]

Among the filed rate doctrine decisions are several "rounding up" cases that are particularly relevant, because they demonstrate that damages for allegedly misleading practices would effectively change a carrier's rates — a result barred by Section 332 as well as the filed rate doctrine.[43] In *Day v. AT&T Corp.*,[44] the California Court of Appeal addressed a case where CMRS subscribers sought injunctive and monetary relief for allegedly misleading advertising practices relating to the "rounding up" of time charged to AT&T prepaid calling cards. The Court held that while plaintiffs were free to seek an injunction, they could not seek monetary relief because awarding such relief would require the court to engage in rate regulation:

> To the extent [plaintiffs] do not seek a monetary recovery they may proceed with their action for injunctive relief. They may not seek to recover any money from [defendants] whether they label their request one for disgorgement or otherwise. The net effect of imposing any monetary sanction on the [defendants] will be to effectuate a rebate. . . .[45]

As did the trial court in the instant case, the Court of Appeal in *Day* observed that the resolution of the plaintiff's claim for monetary relief "would enmesh the trial court in a determination of the reasonableness of the rates."[46]

In *Marcus v. AT&T Corp.*,[47] the court rejected attempts by a subscriber to challenge an interexchange carrier's rounding-up practice under state laws governing breach of warranty,

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42 *Fax Telecommunicaciones Inc. v. AT&T,* 138 F.3d 479, 489 (2d Cir. 1998), *quoting Sun City Taxpayers' Association v. Citizens Utilities Co.*, 45 F.3d 58, 62 (2d Cir. 1995).

43 *See* Exhibit 1 to Petition at 5-6; Exhibit 2 at 5-7; Exhibit 6 at 8-9.

44 *Day v. AT&T Corp.*, 63 Cal. App. 4th 325 (1998).

45 63 Cal. App. 4th at 337.

fraud, negligent misrepresentation, deceptive acts and practices, unjust enrichment, and false advertising. The court held that plaintiffs "who were able to prove their claims and recover damages would effectively receive a discounted rate," and this would violate the filed rate doctrine because it "precludes any judicial action which undermines agency rate-making authority," including a class action.[48]

Disappointed customers have attempted to avoid the filed rate doctrine by pleading fraud or other malfeasance, as in *Marcus* and the case here. In *Wegoland, Ltd v. NYNEX Corp.*,[49] the court determined that damage awards for alleged fraud and RICO violations are barred by the filed rate doctrine, because the court would have to determine the reasonable rate absent the carrier's fraud. As the District Court stated:

> If courts were licensed to enter this process under the guise of ferreting out fraud in the rate-making process, they would unduly subvert the regulatory agencies' authority and thereby undermine the stability of the system. For only by determining what would be a reasonable rate absent the fraud could a court determine the extent of the damages. And it is this judicial determination of a reasonable rate that the filed rate doctrine forbids.[50]

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46 *Id.* at 338.

47 138 F.3d 46 (2d Cir. 1998).

48 138 F.3d at 60, 61.

49 *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17 (2d Cir. 1994).

50 27 F.3d at 21. Likewise, the trial court in *Wegoland* emphasized that "any attempt to determine what part of the rate previously deemed reasonable was a result of the fraudulent acts would require determining what rate would have been deemed reasonable absent the fraudulent acts, and then finding the difference between the two," and that even though the plaintiffs were nominally "seeking an award of damages that does not explicitly ask the court to determine reasonable rates . . . such an award would effectively require determining what a reasonable rate would have been." *Wegoland Ltd. v. NYNEX Corp.*, 806 F.Supp. 1112, 1121-22 (S.D.N.Y. 1992), *aff'd* 27 F.3d 17 (2d Cir. 1994) (citations omitted).

Just as the resolution of the monetary claims in *Day, Marcus,* and *Wegoland* would have required the trial court to determine the reasonableness of the rates charged, resolution of the monetary claims presented in the California class action would require the same determination. It is that determination which is specifically preempted. These cases make clear that virtually any calculation of damages incurred by a subscriber relating to a carrier's services ultimately involves the difference between the rate charged and the appropriate rate, or how much of the profits the carrier can keep and how much they must relinquish. To accomplish this calculation necessitates a finding of the reasonableness of the rate actually charged.[51] In *Day* and *Wegoland Ltd*, the courts were barred from this determination by the filed rate doctrine. In the CMRS context, a state court is barred from making this determination by the express preemption of all state authority over the rates charged by a CMRS provider in Section 332(c)(3)(A).

C. Preemption of State Judicial Awards for Monetary Relief Is Consistent With the Weight of Authority

Courts faced with similar claims have found that adjudication of the dispute constituted rate regulation preempted by Section 332(c)(3)(A). The decision in *In re Comcast Cellular Telecommunications Litigation* squarely addresses the preemptive effect of Section 332(c)(3)(A) in the context of a complaint seeking injunctive and monetary relief for allegedly misleading advertising practices relating to the "rounding up" of time charged to the next full minute and charging for call initiation.[52] The plaintiffs sought compensatory damages, restitution of all amounts collected through the allegedly unlawful business practices and treble damages as a

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[51] *See Wegoland,* 27 F.3d at 21; 806 F. Supp. at 1121; *Day*, 63 Cal. App. 4th at 338.

[52] *In re Comcast Cellular Telecommunications Litigation*, 949 F. Supp. 1193 (E.D. Pa.

result of the wrongs alleged under the Pennsylvania Unfair Trade Practices and Consumer Protection Law.[53] Plaintiffs also sought to enjoin defendants from billing or collecting for call initiation.[54]

In holding that Section 332(c)(3)(A) preempts these state law claims, the Court explained that:

> [a]n examination of the Plaintiff's complaint and the remedies that they seek demonstrates that the driving force behind their allegations is a desire to impose restrictions not only upon the way in which Comcast advertises its rates but also upon the rates which Comcast may charge for mobile telephone services.[55]

The Court thus found that:

> the Plaintiffs' claims present a direct challenge to the calculation of the rate charged by Comcast for cellular telephone service. The remedies they seek would require a state court to engage in regulation of the rates charged by a CMRS provider, something it is explicitly prohibited from doing.[56]

Similarly, in *Ponder v. GTE MobilNet,*[57] the court dismissed a contract claim against a CMRS provider on preemption grounds.

1996).

53 *Id.* at 1200.

54 *Id.* at 1201.

55 *Id.*

56 *Id.*

57 *Ponder v. GTE MobilNet*, 1996 U.S. Dist. LEXIS 19562 (S.D. Ala. Nov. 21, 1996). In *Stabler v. Contel Cellular of the South, Inc.*, 1997 U.S. Dist. LEXIS 20194, at 8 (S.D. Ala. Nov. 17, 1997), however, the court found that Section 332(c)(3)(A) did not preempt plaintiff's contract and fraud claims. The Court characterized plaintiff's claims as a billing dispute the resolution of which is reserved to the states. *Id.* citing H.R. Rep. No. 103-111, at 261. This case is inapposite, however, because Plaintiffs' claims in *Speilholz* are not billing disputes.

WCA cites a number of cases in support of its position that Section 332(c)(3)(A) does not preempt monetary relief for state court claims involving allegedly false advertising and fraudulent business practices. WCA relies heavily on *Tenore v. AT&T Wireless Services* which involved a challenge to the adequacy of a CMRS provider's disclosure concerning the practice of "rounding up" cellular airtime.[58] CTIA submits that WCA's reliance on the *Tenore* decision is misplaced. The *Tenore* court concluded that the plaintiffs were challenging only the disclosure of a billing practice, and not the reasonableness of the underlying rate.59 The court concluded that Section 332(c)(3)(A) did not preempt the plaintiffs because they were not challenging the "reasonableness" of the practice. In the instant case, by contrast, the award of monetary relief necessarily requires the court to examine the reasonableness of LA Cellular's rates and to calculate what rate should have been charged. As the *Comcast* and *Ponder* courts correctly recognized, such a claim improperly implicates the state court in the regulation of cellular rates.

The remaining cases upon which WCA relies do not involve state monetary relief claims based on an evaluation of the rates charged and the service offered. In *Cellular Telecommunications Industry Association v. FCC*, the court upheld the Commission's finding that states have authority to adopt universal service contribution requirements based on an express statutory grant.[60] The court agreed that the universal service contribution requirements did nothing more than increase CMRS providers' cost of doing business which had only an indirect effect on rates,

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58 *Tenore v. AT&T Wireless Services*, 962 P.2d 104 (Wash. 1998) *cert. denied*, 119 S. Ct. 1096 (1999).

59 *Id.*, 962 P.2d at 112.

60 *Cellular Telecommunications. Industry Ass'n v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir. 1999).

and was not rate regulation.[61] The question before the Commission in the instant proceeding, however, involves both a direct effect on rates because a determination of whether the carrier overcharged customers must be made, and an express statutory preemption of state ratemaking authority.

WCA's other cases deal with the issue of whether a federal district court has removal jurisdiction over cases alleging fraud and false advertising. In *Weinberg v. Sprint Corp.*, the federal district court remanded the case back to state court because the plaintiff's allegations of fraud in Sprint's promotional campaign for long distance service were not completely preempted and thus there was no federal question removal jurisdiction.[62] The court in *DeCastro v. AWACS* held that plaintiff's consumer fraud claims were not completely preempted, and thus were not removable to federal court.[63] The court came to a similar conclusion in *Sanderson v. AWACS*, *Bauchelle v. AT&T Corp.*, *Bennett v. Alltel Local Communications*, and *Esquivel v. Southwestern Bell Mobile Systems, Inc.*[64] As discussed above, the issue properly before the Commission is whether Section 332(c)(3)(A) preempts state law claims for monetary damages which would require state courts to determine the reasonableness of CMRS rates. "Complete" preemption of

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61 *Id.*

62 *Weinberg v. Sprint Corp.*, 165 F.R.D. 431 (D.N.J. 1996).

63 *DeCastro v. AWACS*, 935 F. Supp 541, 555 (D.N.J. 1994).

64 *Sanderson v. AWACS*, 958 F. Supp. 947 (D. Del. 1997) (claims that carrier's billing practices violated state's Consumer Fraud Act were not completely preempted and therefore there was no basis for federal question jurisdiction); *Bauchelle v. AT&T Corp.*, 989 F. Supp. 636 (D.N.J. 1997) (there is no basis for federal question jurisdiction for misrepresentation claims under the state's Consumer Fraud Act); (plaintiff's challenge to carrier's billing practices was not completely preempted and the case should be remanded to state court); and *Esquivel v. Southwestern Bell Mobile Systems, Inc.*, 920 F. Supp. 713 (S.D. Tex. 1996) (claim that liquidated damage provision in service contract violates Texas common law was not removable to federal

state consumer protection laws is not in question.[65] However, WCA has employed a common legal tool often used in the removal cases, namely "the artful-pleading doctrine," which involves depicting a federal claim as being entirely governed by state laws to ensure a friendly forum.[66]

None of the cases cited by WCA support its overbroad proposition or undercut the more narrow and appropriate determination here that Section 332(c)(3)(A) preempts claims for monetary relief which require a court to evaluate the propriety of rates charged for CMRS service.

D. The Savings Clause Does Not Preserve State Law Claims for Monetary Relief from Preemption

WCA also argues that Section 414 of the Communications Act, known as the Savings Clause, read together with the "other terms and conditions" clause of Section 332(c)(3)(A) protects state law claims for monetary relief against preemption.[67] The Savings Clause provides:

> Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.[68]

The "terms and conditions" clause of Section 332(c)(3)(A) provides that nothing in this paragraph "shall prohibit a State from regulating other terms and conditions of commercial mobile services."[69] The Savings Clause coupled with the "terms and conditions" clause, WCA

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court).

65 WCA's reliance on *Kellerman v. MCI Communications Corp.* and *Bruss Co. v. Allnet Communications Services* is similarly misplaced. Neither case involves Section 332(c)(3)(A); indeed, both cases were decided well before Section 332(c)(3)(A) was enacted.

66 *See Marcus v. AT&T Corp.*, 138 F.3d at 55.

67 Petition at 14-16.

68 47 U.S.C. § 414.

69 *Id.* at § 332(c)(3)(A).

contends "makes clear that Congress did not intend the preemptive reach of Section 332(c)(3)(A) to extend to state law claims for false advertising and other fraudulent business practices."[70] This argument is without merit.

As WCA recognizes, the Savings Clause preserves only state law claims that are independent of those provided for in the Communications Act.[71] In other words, by inclusion of a savings clause, an Act cannot be read "to destroy itself."[72] Accordingly, the Savings Clause cannot be read to preserve the California class action claims for monetary damages which conflict directly with Section 332(c)(3)(A) of the Communications Act.[73] The Supreme Court expressly held in *Central Office Telephone* that the Savings Clause "preserves only those rights that are not inconsistent with the statutory . . . requirements."[74] Indeed, the Court quoted as dispositive a 1907 decision involving a similar savings clause from the Interstate Commerce Act: "Th[e saving] clause . . . cannot in reason be construed as continuing in [customers] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself."[75]

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70 Petition at 15.

71 *Id.*; *see also Comtronics, Inc. v. Puerto Rico Tel. Co.*, 553 F.2d 701, 707 n.6 (1st Cir. 1977); *Cooperative Communications, Inc. v. AT&T Corp.*, 867 F. Supp. 1511, 1515-17 (D. Utah 1994).

72 *Comcast Cellular*, 949 F. Supp. at 1205, citing *Texas & Pacific Railway. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) (referencing the Interstate Commerce Act).

73 *Kellerman v. MCI Telecommunications Corp.*, 493 N.E.2d 1045, 1051 (Ill. 1986).

74 524 U.S. at 227.

75 524 U.S. at 227-28, *quoting Texas & Pacific Railway v. Abilene Cotton Oil Co.,* 204 U.S. 426, 446 (1907).

CONCLUSION

For the reasons set forth above, CTIA respectfully requests that the Commission declare that state law claims for monetary relief which require state courts to determine the reasonableness of a CMRS provider's rates are preempted under Section 332(c)(3)(A) of the Communications Act.

Respectfully submitted,

CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

Michael F. Altschul
Vice President, General Counsel

Randall S. Coleman
Vice President for
Regulatory Policy and Law

1250 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 785-0081

Its Attorneys

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